

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
JAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN RE: §
§
LAURAH ANN MORTON, § CASE NO. 02-10507-RLJ-13
§
DEBTOR. §

MEMORANDUM OPINION AND ORDER

Option One Mortgage Corporation ("Option One") filed its motion requesting that the court reconsider and set aside its prior order disallowing in part the claim of Option One. The Debtor, Laurah Ann Morton, opposes such relief. Hearing was held on October 6, 2003.

The court has jurisdiction of this proceeding pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(A), (B). This Memorandum Opinion contains the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and FED. R. BANKR. P. 9014.

On December 12, 2002, the Debtor objected to Option One's proof of claim. The objection was served on Option One by mailing the objection to the following: Alana Tokash, Moss, Codilis, Stawiarski, Morris, Schneider, and Prior, L.L.P., P.O. Box 57021, Irvine, CA 92618. The Moss, Codilis firm, through Alana Tokash, had, on July 11, 2002, filed its "Request for Special Notice and Service" (the "July 11, 2002 Request"), which states as follows:

Please take this notice that the undersigned is an authorized agent/entity and hereby enters its request on behalf of OPTION ONE MORTGAGE CORPORATION, A CALIFORNIA CORPORATION, ITS SUCCESSOR AND ASSIGNS, and pursuant to Rule 2002 of the Bankruptcy Rules, requests inclusion into the Master Mailing List and special notice of all events relevant to the above referenced

bankruptcy to and including all notices, pleadings and other documents filed in this proceeding, be sent to the under signed authorized agent.

July 05, 2002

Respectfully submitted,
Moss, Codilis, Stawiarski, Morris,
Schneider, and Prior LLP

s/ Alana Tokash
Alana Tokash
Moss, Codilis, Stawiarski, Morris,
Schneider, and Prior LLP
P.O. Box 57021
Irvine, California 92618-9814
Telephone Number: (949) 790-3600
Facsimile Number: (949) 790-8240
AUTHORIZED AGENT/ENTITY FOR THE
SECURED CREDITOR
Loan number: 373034-8

One day later, July 12, 2002, Option One filed its proof of claim. The proof of claim states that notices are to be sent to the following address: Option One, P.O. Box 57038, Irvine, CA 92618-7038.

A hearing was set on the objection to Option One's proof of claim for March 26, 2003. The Debtor filed a notice of hearing, serving it on Option One, again through Ms. Tokash. Option One did not respond to the objection and failed to appear at the hearing. The objection was sustained, resulting in the court's April 2, 2003 order, which reduced Option One's claim from \$9,197.04 to \$4,652.07. A copy of the order was forwarded by the court to Ms. Tokash.

On May 16, 2003, the Debtor filed her final Chapter 13 plan, which provided for treatment of Option One's claim in a manner consistent with the Debtor's objection and the

April 2, 2003 order. The plan was served on Option One at the address set forth on Option One's proof of claim. It was not served on the Moss, Codilis law firm. Option One did not object to the plan. The plan was confirmed on July 2, 2003.¹

The motion for reconsideration filed by Option One, the matter presently before the court, was filed August 5, 2003. Option One contends it was not properly served with the objection and therefore should not be bound by the April 2, 2003 order. The Debtor argues that Option One received sufficient service and notice of her objection to Option One's claim because she served counsel on the objection to claim and served her final plan on Option One at its address on the proof of claim.

The court requires, at a minimum, that service of an objection to a proof of claim be made to the creditor at the address stated on the creditor's proof of claim. *See* FED. R. BANKR. P. 3007.² The July 11, 2002 Request was filed by Option One pursuant to Rule 2002 of the Bankruptcy Rules. Specifically, Rule 2002(g) provides that notices required by Rule 2002 to a creditor shall be addressed as the creditor or its authorized agent has directed in its last request filed in the case. Rule 2002 sets forth the notice requirements regarding a variety of matters that arise in a bankruptcy case. It does not provide the rules regarding service of an objection to a

¹The usual practice in the Northern District of Texas is to include, along with the debtor's final plan, a generic objection to claims which objects to all secured claims to the extent they are not consistent with the plan. No evidence was provided regarding the filing of such an objection here.

²Some courts have held that an objection to claim initiates a contested matter and must therefore be served in accordance with Rule 7004 of the Bankruptcy Rules. *See, e.g., In re Boykin*, 246 B.R. 825 (Bankr. E.D. Va. 2000). Other courts have held that the objection to a proof of claim is, in essence, a responsive pleading with the proof of claim viewed as analogous to a complaint. *See, e.g., Lomas Financial Corp.*, 212 B.R. 46, 55 (Bankr. D. Del. 1997), *citing Simmons v. Savell* (In re Simmons), 765 F.2d 547, 552 (5th Cir. 1985).

proof of claim.

An attorney may act as an agent for service by filing an appropriate notice of appearance under Rule 9010.³ The July 11, 2002 Request does not constitute a notice of appearance under Rule 9010. *See In re Rae*, 286 B.R. 675, 676 (Bankr. N.D. Ind. 2002) (stating, “[t]he courts have consistently held that an attorney will be considered an agent for service of process only if counsel has been appointed for that precise task.”); *In re Lomas Fin. Corp.*, 212 B.R. 46, 47 (Bankr. D. Del. 1997).⁴

The Debtor’s service of the plan to Option One’s proof of claim address does not cure the problem of service of the objection to the proof of claim. The Fifth Circuit has held that “[a]

³Rule 9010. Representation and Appearances; Powers of Attorney

(a) Authority to act personally or by attorney

A debtor, creditor, equity security holder, indenture trustee, committee or other party may (1) appear in a case under the Code and act either in the entity's own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(b) Notice of appearance

An attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record.

(c) Power of attorney

The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim or the acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to the appropriate Official Form. The execution of any such power of attorney shall be acknowledged before one of the officers enumerated in 28 U.S.C. § 459, § 953, Rule 9012, or a person authorized to administer oaths under the laws of the state where the oath is administered.

⁴Rule 2002 states that the address designated on a proof of claim, if filed last, is the operative address for Rule 2002 notices. *See* FED. R. BANKR. P. 2002(g).

secured creditor is . . . not bound by a plan which purports to reduce its claim where no objection has been filed.” *In re Howard*, 972 F.2d 639, 640-41. As service of the objection was improper, the court treats it as if no objection to the claim was filed. Thus, *Howard* is directly applicable to this case.

The Debtor’s failure to properly serve Option One is sufficient cause for reconsideration of the court’s April 2, 2003 order. *See* 11 U.S.C. § 502(j). It is hereby

ORDERED that the April 2, 2003 order of this court is vacated; it is further

ORDERED that hearing on the objection to claim of Option One is hereby set on the court’s docket of December 3, 2003, at 11:00 A.M.

DATED: NOV 10 2003.



ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE

The Clerk shall provide copies to:

Attorney for Debtor: Phil Black, Law Offices of Phil Black, 1290 South Willis, Commerce Plaza, Suite 222, Abilene, TX 79605;

Attorney for Option One Mortgage Corporation: Cristina Platon Camarata, Baxter & Schwartz, P.C., 5450 NW Central, Suite 307, Houston, TX 77092; and

Chapter 13 Trustee: Walter O'Cheskey, 2575 S. Loop 289, Suite 103, Lubbock, TX 79423.